

**UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS**

IN RE: PHARMACEUTICAL INDUSTRY
AVERAGE WHOLESALE PRICE
LITIGATION

MDL NO. 1456

THIS DOCUMENT RELATES TO:

TRACK TWO SETTLEMENT

CIVIL ACTION: 01-CV-12257-PBS

Judge Patti B. Saris

**PLAINTIFFS' THIRD SUPPLEMENTAL SUBMISSION IN SUPPORT OF FINAL
APPROVAL OF THE REBALANCED TRACK TWO SETTLEMENT**

Plaintiffs, by their counsel, submit this supplemental brief in support of final approval of the rebalanced Track Two settlement, which settlement is scheduled for hearing on November 22, 2011. In sum, Plaintiffs timely completed a supplemental notice mailing concerning the rebalancing of the settlement consideration and received (i) no new objections from third-party payor ("TPP") class members and (ii) only eight new objections from consumers, most of whom are required to submit additional documentation for certain drugs.

In compliance with the Court's electronic Order Directing Notice of Track Two Settlement Revision to Affected Class Members and Scheduling Fairness Hearing (Dkt. No. 7772), Settlement Administrator Rust Consulting, Inc. ("Rust") mailed the Notice of Revision to Proposed Class Action Settlement Involving Certain Drugs (the "Supplemental Notice"). The Supplemental Notice was mailed on September 16, 2011 to 865 Class 2 and Class 3 TPPs who had previously filed a claim form. Declaration of Daniel Coggeshall Regarding Track Two Supplemental Notice ("Coggeshall Decl."), ¶ 4. On that same date, Rust also mailed the Supplemental Notice to 64,158 consumer Class members who fell into the following categories: (i) all Consumer Class members who timely filed claims and whose settlement amount under the

revised distribution formula calculated to less than the original settlement amount; (ii) Class 1 consumer claimants whose CMS data indicates an administration of a drug under the “not otherwise classified” J-Codes J3490 and J8999 or under the J-Codes for Epogen and Eligard and those consumers in Class 3 whose claim forms indicate an administration for Epogen or Eligard; and (iii) those Consumer Class members with payments for Leukine and Novantrone after 2002. The Supplemental Notice was also posted on the Track Two Settlement website (www.awptrack2settlement.com). *Id.*, ¶ 5.

As the Court is aware, the Supplemental Notice advised affected Class members of the change in the settlement terms. The deadline for receipt of additional requests for exclusion in response to the supplemental Consumer Notice was October 28, 2011. To date, the Claims Administrator has received 289 new exclusion requests from Class 1 members and two new exclusion requests from Class 3 members. *Id.*, ¶ 6.

The objection deadline was October 21, 2011. Class Counsel have not received any objections from any of the 865 TPPs. Out of the 64,158 consumers who received the Supplemental Notice, we have received just eight objections.¹ A summary of the objections, Class Counsel’s response thereto, and the status of each objection is attached as Table 1. The majority of the objectors expressed difficulty in obtaining the additional documentation for Epogen administrations, and we were able to provide sufficient assistance to enable them to obtain the documentation. We believe that five of the eight objections are resolved.

Class Counsel continue to believe that the Track Two Settlement, as revised, is fair and reasonable. We respectfully request that the Court grant final approval.

¹ And of the eight, two are not proper objections. The Bethune objection is not proper because (i) it was not filed with the Court and served on Class Counsel as required, and (ii) the objection does not pertain to the revised terms of the Proposed Settlement. The Ivey objection is not proper because it was not filed with the Court. *See* Table 1.

DATED: November 18, 2011

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CERTIFICATE OF SERVICE

I hereby certify that I, Steve W. Berman, an attorney, caused a true and correct copy of the foregoing, ***Plaintiffs' Third Supplemental Submission in Support of Final Approval of the Rebalanced Track Two Settlement***, to be delivered to all counsel of record by electronic service pursuant to Paragraph 11 of the Case Management Order No. 2, by sending on November 18, 2011, a copy to LEXISNexis File & Serve for posting and notification to all parties.

/s/ Steve W. Berman
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